Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MARSHALL C. SPIEGEL,

Petitioner,

v.

DANIEL M. RABINOVITZ,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prosecutor's conduct is shielded from liability under 42 U.S.C. § 1983 by the doctrine of absolute immunity, when the disputed conduct occurred during the prosecutor's investigation to learn whether there was sufficient evidence to establish probable cause to pursue criminal charges against Petitioner.

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Petitioner Marshall C. Spiegel respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was released on June 2, 1997 as an unpublished order but was later reissued on July 28, 1997 as a published opinion. It is reported at 121 F.3d 251(7th Cir. 1997) and reproduced at 1a. The judgment of the United States District Court for the Northern District of Illinois, Eastern Division is reported at 924 F.Supp. 883 (N.D. Ill. 1996) and reproduced at 14a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 2, 1997. App. 1a. On August 28, 1997, Justice Stevens extended the time for filing a petition for writ of *certiorari* in this Court to and including October 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

2. The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."
3. Section 1983 of United States Code, Title 42, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

This case[1] arose when Respondent Daniel Rabinovitz[2], an Assistant State's Attorney in Cook County, Illinois, was assigned to determine whether there was sufficient evidence to prosecute Petitioner Marshall Spiegel on the charge of criminal battery. Spiegel was accused of kicking his neighbor, Loren Cherny, during an argument. Rabinovitz conducted a deeply flawed and potentially biased investigation. Nevertheless he recommended that Spiegel be prosecuted. Spiegel was

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[1] Because this case comes to the Court following the district court's granting of a Motion to Dismiss, the Court "must accept as true all the factual allegations in the complaint." Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993) (citing United States v. Gaubert, 499 U.S. 315, 327 (1991)).

[2] The district court misspelled Respondent's name as "Rabinowitz." *See* Br. Def., at 3 n.1.

tried and acquitted, but not before he suffered financial losses. To obtain recompense, he brought an action under 42 U.S.C. § 1983 against Rabinovitz. The district court granted Rabinovitz's Motion to Dismiss on the ground that Rabinovitz had acted as a prosecutor when he investigated the charges against Spiegel and was therefore shielded from liability under § 1983 by the doctrine of absolute immunity. The Court of Appeals affirmed.

1. *A Violent Argument and Conflicting Complaints.* On May 29, 1993, Marshall Spiegel and his family were disturbed by the sound of hammering coming from the apartment above them. Spiegel's wife, Carol, walked upstairs to complain about the noise and to ask the neighbors to stop. An argument ensued between her and the upstairs tenants, Loren Cherny and Mim Bobbin, Cherny's common-law wife. Spiegel overheard the argument, and hustled upstairs with his young son in his arms. At a point after Spiegel reached the upstairs apartment, Bobbin threatened Spiegel that Cherny would kill him. Cherny hit Spiegel in the back and Bobbin also struck him. These blows were physically unprovoked: Spiegel had not laid a hand on Cherny or Bobbin.

Two days later, Spiegel reported the incident to the police. On June 23, he caused complaints to be filed against Cherny and Bobbin on the charge of criminal battery. Neither was arrested and the police made no investigation. In keeping with standard procedure in misdemeanor cases under Illinois law, *see* 725 ILCS 5/107-12, Cherny and Bobbin were each sent a notice to appear, which included a court date. When they got their notices two days later, Bobbin and Cherny responded in kind. They swore out

complaints against Spiegel, alleging that he had kicked Cherny.

2. *Spiegel's Arrest and Confinement.* This time the police did not follow standard procedure. Instead of sending Spiegel a notice to appear, as they had done for Cherny and Bobbin, the police called Spiegel at home. The officer on the line demanded that Spiegel turn himself in at the station, or he would be arrested at his apartment. Spiegel tried to explain that the charges against him were filed in retaliation for the complaint he had filed against Cherny and Bobbin, but to no avail. With no alternative but to surrender himself to the police, Spiegel hired a lawyer and drove to the station later that day. He was booked, fingerprinted, and locked in a cell for more than an hour before he posted bond and was released.

The constitutionality of Spiegel's arrest and imprisonment has been cast in substantial doubt. Based on the facts in the case at bar, Spiegel brought a § 1983 action against the officers who arrested him. The officers filed a motion for summary judgment, which the court denied.

> [W]e find that a reasonable jury could conclude that Cherny and Bobin [sic] were grudge-bearing complainants and that Cortese [the arresting officer] should have conducted a more thorough investigation by searching for independent evidence.

Spiegel v. Cortese, et al., 966 F.Supp. 684, 698 (N.D. Ill. 1997). Soon after this decision, Spiegel's case against the officers went to trial. A jury returned a verdict in Spiegel's favor, finding that the officers had performed an inadequate investigation and therefore lacked probable cause when they arrested Spiegel.

3. *Events Leading Up To This Case.* Spiegel's charges against Cherny and Bobbin and their charges against Spiegel were placed on court call for August 4, 1993. On that same day, Daniel Rabinovitz, a Cook County Assistant State's Attorney, was assigned to investigate the facts alleged in the conflicting complaints. Neither a judge nor an assistant state's attorney became involved with this case before the date listed in the summons. Before that date, the only official investigation of the case had been made by the police, and they failed to establish probable cause to arrest Spiegel. That is why Rabinovitz's assignment was critical. He was asked to determine whether the evidence established probable cause and to recommend how the State's Attorney's Office should proceed.

Rabinovitz reviewed the police reports—which simply recorded events as told by each person who filed a complaint—and questioned Cherny, Bobbin, and the Spiegels after administering a *Miranda* warning to each of them. He then filed a report with his superiors, recommending that the charges against Cherny and Bobbin be dropped and that Spiegel be prosecuted for criminal battery.

Spiegel was tried and swiftly acquitted. While vindicated by the verdict, he nonetheless suffered substantial injuries as a consequence of having been prosecuted for a crime of which he was innocent. Spiegel was evicted from his apartment, his employment status with the Chicago Mercantile Exchange was "adversely affected," and he lost and continues to lose income.

4. *Proceedings Below.* Spiegel brought this action under 42 U.S.C. § 1983 against Rabinovitz in his individual capacity. It is based on the deliberately

slipshod way that Rabinovitz investigated Spiegel's run-in with his neighbors. Rabinovitz overlooked or failed to discover material facts that would have tended to exonerate Spiegel. They include the following:

A. Rabinovitz ignored what Spiegel and his attorney reported, namely that Cherny and Bobbin waited three weeks after the fight to file complaints against Spiegel—until *after* they learned of Spiegel's complaint against *them*.

B. On June 1, 1993, Bobbin signed a written statement describing the argument with Spiegel. The statement nowhere mentions that Spiegel touched Cherny.

C. Testimony of disinterested witnesses, including Cherny and Bobbin's next-door neighbor, corroborated that Spiegel was not the attacker, but the victim.

Finally, Rabinovitz had reason to be biased against Spiegel. Before this case arose, Spiegel had filed charges with the Illinois Attorney Registration and Disciplinary Commission against another Assistant State's Attorney who worked with Rabinovitz. As a result of those charges, the State's Attorney's Office ordered Rabinovitz to prosecute that case, where Spiegel was the complaining witness. Rabinovitz lost the case.

Spiegel's complaint alleged that Rabinovitz's acts and omissions, conducted under color of state law, violated Spiegel's rights under the Due Process Clauses of the Fifth and Fourteenth Amendments. Spiegel maintained that Rabinovitz's actions were intentional and malicious and constituted reckless disregard for Spiegel's constitutional rights. He demanded compensatory and punitive damages.

Rabinovitz filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6). He asserted that Spiegel failed to raise issues cognizable under 42 U.S.C. § 1983 and that Rabinovitz, as a prosecutor, was absolutely immune from suit.

Exercising jurisidiction under 28 U.S.C. § 1343(a)(3), the district court dismissed Spiegel's case. The district court found that Spiegel had stated a claim for malicious prosecution under § 1983, *id.* at n.4, but that Rabinovitz was absolutely immune from suit. Couching the essential issue in terms of "which prosecutors possess immunity," *id.* at 31a, the court expressed its "reluctan[ce] to approve a rule which would make the outcome of immunity questions depend upon the precise nature of the chain of command in a prosecutor's office." *Id.* Based on this approach to the case, the district judge arrived at the following conclusion:

> It is my view that a prosecutor who is told by his superiors to investigate a pending charge and to report back is performing a prosecutorial, not a police, function. I think this is the policy of the Supreme Court.

Id. at 31a.

The Seventh Circuit affirmed. The court began its analysis of the immunity issue[3] by tacitly acknowledging

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[3] In addition to addressing the immunity issue, the circuit panel discussed whether Spiegel had alleged a contitutional tort cognizable under § 1983. *See* App. at 15a. The court concluded that he had not. Its discussion of this issue, however, is dicta.

The district court rested its decision to grant Rabinovitz's Motion to Dismiss on the sole ground that Rabinovitz enjoyed absolute immunity. *See* 31a. The court's only discussion of whether Spiegel alleged a constitutional tort occurs in footnote 4. There the court

that it regarded *Imbler v. Pachtman*, 424 U.S. 409 (1976) as controlling law.

> The Supreme Court has held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages. . . ." Imbler v. Pachtman, 424 U.S. 409, 431 . . . . *This Court has read Imbler broadly*:
>
> > When determining which type of immunity a [prosecutor] enjoys, we look to the nature of the function that the [prosecutor] was performing in the particular case. If a [prosecutor's] function was quasi-judicial, the [prosecutor] enjoys absolute immunity.

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expressed its willingness to permit the complaint to be amended to correct the "trivial objection, *see id.* at 23a, n.4," that malicious prosecution is a claim properly brought under the Fourth Amendment, not the Fifth. And it concluded that Spiegel had alleged sufficient injury to make out a claim under § 1983. *See id.* Absent the court's holding that Rabinovitz is entitled to absolute immunity, the district court opinion gives every reason to believe that Spiegel's complaint would survive a Motion to Dismiss unencumbered by the question of whether his complaint states a compensable claim under § 1983. Moreover, there are substantial arguments to be made in favor of that claim. *See, e.g.*, David Achtenberg, *With Malice Toward Some:* United States v. Kirby, *Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273 (1995); James Lank, Note, *The* Graham *Doctrine as a Weapon Against Substantive Due Process*, 17 HARV. J.L. & PUB. POL'Y 918 (1994); John T. Ryan, Jr., Note, *Malicious Prosecution Claims Under Section 1983*, 64 GEO. WASH. L. REV. 776 (1996).

Whether Spiegel's complaint states a constitutional injury is a question that can be answered at this point in the proceedings, however, only by rendering an advisory opinion. The Court has long adhered to a rule of refusing to render such opinions. Lee, *Deconstitutionalizing Justiciability*, 105 HARV. L. REV. 603, 655-45 (1992). It is therefore inappropriate to present this question to the Court for review.

> If the function was administrative or investigatory, the [prosecutor] enjoys only qualified immunity.

Spiegel v. Rabinovitz, App. 10a-11a (citing *Henderson v. Lopez*, 790 F.2d 44, 46 (7th Cir.1986)) (emphasis added).

The panel next responded to Spiegel's argument that Rabinovitz is entitled only to qualified immunity, because he functioned, not as a prosecutor, but as an investigator.

> We recall that in Buckley, the Supreme Court stated that absolute immunity must extend to "the [prosecutor's] professional evaluation of evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." . . . In this case, Rabinovitz simply evaluated the evidence assembled. He reviewed the police records, interviewed the parties involved, and then passed on his assessment of the case to his superior.

Id. at 257 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)).

The panel further tried to distinguish *Buckley* on the facts.

> In this case, two complaints were brought. In response, the police conducted an investigation and wrote up reports. Rabinovitz merely reviewed these documents and interviewed the parties in order to evaluate the value of the cases involved. This is clearly not the same case as Buckley, where the Supreme Court found that the prosecutors were not functioning as "advocates" when they went to the scene of the crime to determine

> whether a boot print found there was made by the plaintiff, who was a suspect at the time.

Id. (citing *Buckley*, 509 U.S. at 274).

The circuit panel then acknowledged that "[t]he Court [in *Buckley*] had concluded that a prosecutor is not an advocate before he has probable cause to have anyone arrested." *Id.* Based on the district court's finding that the evidence established "probable cause for Rabinovitz to file a charge against *some* individual," 13a (emphasis added), the panel held that "Rabinovitz is entitled to absolute immunity because he functioned as a prosecutor in this case." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

"[O]ne of the strongest possible grounds for securing the issuance of a writ of certiorari," ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 174 (7th ed., 1993), is present when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). This case presents such a conflict. The Seventh Circuit's holding below conflicts with this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

In *Buckley* the Court addressed whether a prosecutor was absolutely immune from liability under § 1983 for fabricating evidence during the preliminary stage of a criminal investigation and for making false statements

at a press conference. *See id.* at 261. The Court began its analysis by rehearsing the well-established contours of absolute immunity under § 1983.

"Section 1983 on its face admits of no defense of official immunity," *id.* at 268, but the Court has held that "Congress did not intend § 1983 to abrogate immunities 'well grounded in history and reason.'" *Id.* (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). These chiefly include "[c]ertain immunities . . . so well established in 1871, when § 1983 was enacted, that '[the Court] presume[s] that Congress would have specifically so provided had it wished to abolish' them." *Id.* (quoting *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)).

"Since *Tenney*, [the Court has] recognized two kinds of immunities under § 1983." *Id.* Public officials usually enjoy only qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Butz v. Economou*, 438 U.S. 478, 508 (1978). This form of immunity shields officials from liability for how they perform their discretionary duties when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

It is ordinarily difficult for an official to successfully claim absolute immunity. "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). Indeed, the Court has been "quite sparing," *Forrester v. White*, 484 U.S. 219, 224 (1988), in recognizing functions that deserve such strong protection from personal liability.

The Court applies a "functional approach," *Burns*, 500 U.S. at 486, to test whether a particular official function merits the cloak of absolute immunity. This approach "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley*, 509 U.S. at 269. The Court has repeatedly affirmed that certain functions of prosecutors pass this test.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court held that "a state prosecutor ha[s] absolute immunity for the initiation and pursuit of a criminal prosecution, including the State's case at trial." *Buckley*, 509 U.S. at 269. There the Court adopted the rule that a prosecutor is entitled to absolute immunity for conduct that is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. This rule fixed a line separating conduct for which a prosecutor could claim qualified immunity and conduct for which he could claim absolute immunity. *See id.* On one side lay conduct of a prosecutor acting in the role of advocate; on the other lay conduct of a prosecutor acting in the role of investigator or administrator. *See id.* at 431 and n.33.

The Court applied the *Imbler* analysis in *Burns v. Reed*, 500 U.S. 478 (1991). There the Court held that a prosecutor was entitled to absolute immunity for "participating in a probable-cause hearing," *Buckley*, 509 U.S. at 270, but *not* for "giving legal advice to the police on the propriety of hypnotizing a suspect and on whether probable cause existed to arrest that suspect." *Id.* The Court reached this conclusion because it reasoned that absolute immunity for "appearing before a judge and presenting evidence in support of a motion for a search warrant involved the prosecutor's 'role

as advocate for the State.'" *Id.* at 270-71 (quoting *Burns v. Reed*, 500 U.S. at 491). Because the Court could not "identify any historical or common-law support for absolute immunity," *Buckley*, 509 U.S. at 271, to shield a prosecutor from liability for giving legal advice to the police, however, the Court reasoned that giving such advice "was not a function 'closely associated with the judicial process.'" *Buckley*, 509 U.S. at 271 (quoting *Burns*, 500 U.S. at 495).

The *Buckley* Court further refined the analytical approach enunciated in *Imbler* and *Burns*. It began by elaborating *Imbler's* distinction between conduct that falls with the zone of protection deserving of absolute immunity and conduct that does not. On one side of the line, the Court emphasized that "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Id.* at 273.

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.

Id. "When the functions of prosecutors and detectives are the same . . . the immunity that protects them is the same also." *Id.* at 276.

In addition to these functional indicia of non-qualification for absolute immunity, the Court laid down a *per se* test. "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274. The Court explained that this rule could not be easily evaded. "[A] determination of probable cause does

not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." *Id.* at 274 n.5.

On the other side of the line, the Court reaffirmed its commitment to the propriety of absolute immunity for certain prosecutorial functions.

> We have not retreated . . . from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Id.

Based on these principles, the Court held that the prosecutors in *Buckley* were entitled only to qualified immunity for allegedly manufacturing evidence before probable cause to arrest had been established. *See id.* at 275. And it held that the prosecutor's false statements made during a press conference were not shielded by absolute immunity. The Court could find no common law immunity that covered a prosecutor's out-of-court statements to the media in 1871. Furthermore, it determined such statements fail the functional test. "Comments to the media have no functional tie to the judicial process just because they are made by a prosecutor." *Id.* at 277.

The Seventh Circuit decision below is at odds with the decision of the Court in *Buckley*. That conflict is greatest just where *Buckley* added something new to

APPENDIX

Marshall C. SPIEGEL, Plaintiff-Appellant,
v.
Daniel M. RABINOVITZ, Defendant-Appellee.

No. 96-2150.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 10, 1997.

Decided June 2, 1997.
Opinion Published July 28, 1997. [FN1]

FN1. Pursuant to Circuit Rule 53, this opinion was originally issued as an unpublished order on June 2, 1997. The court, upon request, issues this decision as an opinion.

David C. Thomas (argued), Chicago, IL, for plaintiff-appellant.

Terry L. McDonald, Patrick M. Blanchard (argued), Office of the State's Attorney of Cook County, Chicago, IL, for defendant-appellee.

Before BAUER, EASTERBROOK and DIANE P. WOOD, Circuit Judges.

BAUER, Circuit Judge.

On May 29, 1993, Marshall Spiegel ("Spiegel") and his family were disturbed by the clamor of hammering emanating from the apartment above them. This was not the first time that the Spiegels had endured such racket. Spiegel's wife, Carol, walked upstairs to complain. She soon became embroiled in an argument with the upstairs tenants, Loren Cherny and his common-law wife, Mim Bobbin. [FN2] Overhearing this argument, Spiegel dashed upstairs holding his young son in his arms. Some time after Spiegel reached the upstairs apartment, Bobbin threatened that Cherny would kill Spiegel. Cherny struck Spiegel in the back, and Bobbin also hit him. The record is not clear as to what occurred between the time of Spiegel's arrival upstairs and the ensuing threat and blows. We do know, however, that Spiegel never laid his hands on Bobbin or Cherny.

FN2. The record is not clear as to whether and how Bobbin and Cherny are common-law husband and wife. Illinois, of course, does not recognize common-law marriages. But if a couple contracts a common-law marriage and that couple is domiciled in another state that recognizes common-law marriage, Illinois will consider that marriage valid if the couple subsequently sets up its domicile here. Generally, those jurisdictions that recognize common-law marriages have determined that the essence of a common-law marriage is a present intent to enter into the contract of marriage usually coupled with cohabitation and a holding out of the marital relationship in the couple's community of residence. Thus, it is possible that Bobbin and Cherny were once domiciled in a state that recognizes, or once recognized, common-law marriage. For all we know, the couple may have lived in such a state, consummated their relationship, held themselves out before both God and man to be husband and wife, and then later decided to set up shop in Illinois, all before they got into this scrape with Spiegel. However, suffice it to say that we need not, nor do we

wish to, delve into the sordid details as to why Bobbin is referred to as Cherny's "common-law wife" in the proceedings below.

On May 31, 1993, Spiegel reported the incident to the police. On June 23, Spiegel filed criminal complaints, charging Bobbin and Cherny with battery. When they learned of these charges on June 25, Bobbin and Cherny, in turn, filed criminal battery complaints against Spiegel. Specifically, these complaints charged Spiegel with committing battery against Cherny. On that same day, Spiegel was booked, fingerprinted and placed in a cell for over an hour before he posted bond and was released.

The two criminal cases were placed on the same court call for August 4, 1993. On that same day, Daniel Rabinovitz, a Cook County Assistant State's Attorney, was assigned to assess whether the office should pursue one or both of the cases. Rabinovitz reviewed the police reports, spoke with the police officers involved, and questioned all of the players in this case after administering a Miranda warning to each of them. He then submitted his evaluation to his superiors.

The State's Attorney's Office decided to pursue only Bobbin's and Cherny's case against Spiegel. Spiegel was tried and acquitted. In the interim, Spiegel claims that he was evicted from his apartment, his employment status with the Chicago Mercantile Exchange was "adversely affected," and he lost and continues to lose income.

Spiegel brought this action under Title 42 U.S.C. § 1983 against Rabinovitz in his individual capacity. Spiegel alleged that the State's Attorney's Office relied on Rabinovitz's report when it decided not to pursue Spiegel's battery case against

Bobbin and Cherny and went ahead with Bobbin's and Cherny's battery case against Spiegel. Spiegel alleged that Rabinovitz conducted a willfully incomplete and inadequate assessment of the case. According to Spiegel, Rabinovitz should have uncovered a signed, written statement by Bobbin which failed to mention that Spiegel touched Cherny. Spiegel also claimed the Rabinovitz should have realized that Cherny manufactured evidence by submitting a photograph of a bruise that Spiegel could not have inflicted. Spiegel believed that Rabinovitz overlooked witnesses, including a disinterested neighbor, who could have corroborated Spiegel's version of the events of May 29. Spiegel further contended that Rabinovitz should have been mindful that Cherny's and Bobbin's charges against Spiegel came only after they learned of his charges against them. Finally, Spiegel maintained that Rabinovitz was biased against Spiegel because Spiegel at one time had filed charges with the Attorney Registration and Disciplinary Commission against one of Rabinovitz's co-workers. With Spiegel as the complaining witness, Rabinovitz subsequently prosecuted and lost this case against his co-worker.

Spiegel alleged that Rabinovitz's acts and omissions, conducted under color of state law, violated Spiegel's Fifth and Fourteenth Amendment rights. Spiegel maintained that Rabinovitz's actions were intentional and malicious and constituted reckless disregard for Spiegel's constitutional rights. He requested compensatory damages and punitive damages. In response, Rabinovitz brought a 12(b)(6) Motion to Dismiss, asserting that he, as a prosecutor, was absolutely immune from suit and that Spiegel failed to raise issues cognizable under 42 U.S.C. § 1983. The district court found that Spiegel had stated a claim for malicious prosecution under § 1983 but that Rabinovitz was absolutely immune from suit. The district court dismissed Spiegel's case. Spiegel now appeals, arguing that the

district court erred when it determined that Rabinovitz was absolutely immune from suit.

We review de novo a district court's 12(b)(6) dismissal. *Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir.1997) (citation omitted). We accept as true all facts alleged in the complaint and draw all reasonable inferences from them in the plaintiff's favor. Id. (citations omitted). We will affirm the dismissal of a complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Id. (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)).

Title 42 U.S.C. § 1983 creates a federal cause of action for "the deprivation, under color of [state] law, of a citizen's rights, privileges, or immunities secured by the Constitution and laws of the United States." Id. (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 132, 114 S.Ct. 2068, 2082, 129 L.Ed.2d 93 (1994)). Section 1983 is not itself a font for substantive rights; instead it acts as an instrument for vindicating federal rights conferred elsewhere. Id. at 356 (citation omitted). The first step in any § 1983 analysis is to pinpoint the specific constitutional right which was allegedly violated. Id. (citing *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1175 (7th Cir.1994)). The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right. *Graham*, 490 U.S. at 394, 109 S.Ct. at 1870.

In this case, Spiegel presents his claim of malicious prosecution within the confines of substantive due process. The protections of substantive due process have been conferred primarily upon matters relating to marriage, family, procreation, and the right to bodily integrity. See, e.g., *Reproductive*

Services of Southeastern Pa. v. Casey, 505 U.S. 833, 847-49, 112 S.Ct. 2791, 2804-05, 120 L.Ed.2d 674 (1992) (describing cases in which substantive due process rights have been recognized). Spiegel's malicious prosecution claim is strikingly different from those rights which have been recognized under the rubric of substantive due process.

In general, the common law tort of malicious prosecution does not amount to the deprivation of a constitutional right under 42 U.S.C. § 1983; however, malicious prosecution, like the common-law tort of defamation, can be a component of a constitutional tort. *Albright v. Oliver*, 975 F.2d 343, 346 (7th Cir.1992). For example, in Albright, we stated that defamation accompanying a discharge from a job can make it impossible for a person to procure equivalent employment elsewhere, thus depriving him of the liberty of occupation, one of the liberties protected by the Due Process Clause. Id. In the same vein, malicious prosecution can result in imprisonment, which is likewise a deprivation of liberty within the confines of the Due Process Clause. Id. Put another way, we said that in the absence of "incarceration or other palpable consequences," malicious prosecution should not be actionable as a constitutional wrong. Id. at 347.

In Albright, a criminal information was issued charging Albright with drug trafficking. Albright was booked and posted bond. One condition of his bond was that he not leave Illinois without the court's permission. Shortly before trial was to begin, the court dismissed the information against Albright because it failed to state an offense recognized under Illinois law.

Albright subsequently brought a § 1983 claim in federal district court. Albright alleged that the case had received some

publicity and that he missed a job interview in St. Louis due to the travel restriction of his bond. He argued that these consequences resulted from his prosecution and were sufficiently serious to elevate his common-law malicious prosecution claim to the level of a constitutional tort. On appeal, we disagreed, reasoning:

> The medley of harms that a malicious prosecution inflicts when, as in this case, the defendant is exonerated before any punishment is imposed-indeed, before he is even put on trial--is similar to that inflicted by defamation, which by impairing a person's reputation not only embarrasses and even outrages him but also undermines his ability to make favorable transactions, whether business or personal, thereby subjecting him to costs pecuniary or nonpecuniary or both. It also puts him to the expense of bringing a suit for defamation to recover his good name. If the injuries that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes.

Id. at 345-46. Albright's case subsequently went before the United States Supreme Court.

Before the Supreme Court, Albright claimed that police violated only his substantive due process right to be free from prosecution without probable cause. *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 811, 127 L.Ed.2d 114 (1994). The Supreme Court affirmed our decision, but the plurality did so on different grounds. Writing for the plurality, Chief Justice Rehnquist, joined by Justices O'Connor, Scalia and Ginsburg,

held that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process. Id. at 281, 114 S.Ct. at 816. Specifically, the plurality opined that "substantive due process, with its 'scarce and open-ended' 'guideposts,' can afford ... no relief." Id. at 275, 114 S.Ct. at 813 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992)).

Justice Kennedy, joined by Justice Thomas, concurred with the plurality. However, Kennedy wrote separately because he believed that the root of Albright's due process claim concerned not his arrest but instead the malicious initiation of an unfounded criminal prosecution against him. Id. at 281, 114 S.Ct. at 816. Justice Kennedy stated that "[i]n the ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983, at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment simpliciter.' " Id. at 285, 114 S.Ct. at 819 (quoting *Parratt v. Taylor*, 451 U.S. 527, 536, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981)). Justice Kennedy went on to say that "Illinois provides a tort remedy for malicious prosecution; indeed, Albright brought a state-law malicious prosecution claim, albeit after the statute of limitations had expired.... Given the state remedy and the holding of Parratt, there is neither need nor legitimacy to invoke § 1983 in this case." Id. at 285-86, 114 S.Ct. at 819-20.

This Court's subsequent case of *Smart v. Board of Trustees of the University of Illinois* is also instructive. 34 F.3d 432 (7th Cir.1994). In *Smart*, we concluded that if a state actor wages a malicious prosecution which results in the arrest or some other seizure of the defendant, an infringement of liberty occurs. 34

n3 I assume co-worker means another Assistant States Attorney.

Rabinowitz gave the results of his flawed investigation to his superiors. On top of this, he failed to report that Marshall Spiegel told him that Bobbin had followed plaintiff and pushed him from behind.

The States Attorney decided not to pursue the complaints of Marshall Spiegel and proceeded with the case against Marshall Spiegel.

Marshall Spiegel defended the charge and won acquittal. He paid a lawyer to defend him. He says that this complaint and subsequent trial caused his eviction, a loss of employment status and a loss of income.

Finally, he says that Rabinowitz did this intentionally and maliciously.

It is difficult to sue a prosecutor. They are immune. Their immunity extends only to their acts as prosecutors even if the acts are malicious. If they step over the line into, say, police work, they lose absolute immunity and are left with qualified immunity. This rule is invoked by plaintiffs' use of the mantra "factual investigation" when he describes what defendant did. I had thought that any prosecutor was still being a prosecutor even if she decided not to limit her assessment of a case to police reports. Interviewing witnesses is one way a prosecutor can assess the weight of a pending case. What I think, however, is not controlling; the Supreme Court jurisprudence is controlling, so I turn to that.

In *Imbler v. Pachtman*, 424 U.S. 409, 420-424, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976), the Supreme Court of the United States sanctified the widely accepted rule of absolute immunity for prosecutors. Imbler had received the death penalty for murder. He defended with an alibi offering his own testimony and that of another. The primary identification witness was one Costello. After trial, the prosecutor Pachtman wrote to the Governor of California describing evidence he later discovered which corroborated the alibi, as well as new revelations about Costello's background which made him seem less trustworthy than he had appeared at trial. Imbler eventually sued Pachtman claiming he conspired unlawfully to charge and convict Imbler through intentionally allowing false testimony, altering a police artist sketch and proceeding despite a lie detector test that "cleared" Imbler. The Court denied Imbler's right to sue. It said,

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and -- ultimately in every case -- the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system. Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to

doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgement as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.

The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to § 1983 liability. Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.

We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by

skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. *Gregoire v. Biddle,* 177 F.2d 579, 581 (C.A.2 1949).

Imbler, 424 U.S. at 424-28.

The Court also emphasized that during the initiation stages of a prosecution, the prosecutor is constantly required to make decisions on extremely sensitive issues. Some of these questions include "whether to present a case to a grand jury, whether to file an information, whether to dismiss an indictment against particular defendants, which witnesses to call and what other evidence to present." *Imbler,* 424 U.S. at 431 n.33. And although the Court did not expressly state an opinion as to whether these decisions would be protected by absolute immunity, the Court stated: "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence." Id.

Then came *Burns v. Reed,* 500 U.S. 478, 492, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991), which found a prosecutor to be

absolutely immune from liability arising from his actions at a probable cause hearing. For his legal advice to police he has only qualified immunity. *Burns*, 500 U.S. at 496. The principle applied was a "functional approach" which looks to "the nature of the function performed, not the identity of the actor who performed it." *Id.* at 486 (quoting *Forrester v. White*, 484 U.S. 219, 229, 98 L. Ed. 2d 555, 108 S. Ct. 538 (1988). The Court emphasized that the duties included within a prosecutor's role as an advocate for the State involved actions performed outside the courtroom and actions preliminary to the actual initiation of a criminal prosecution. *Burns*, 500 U.S. at 486.

Finally, there is *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). The prosecutors were alleged to have manufactured false evidence by shopping for experts who would give an opinion they wanted. Since all of this occurred before they had probable cause or had even convened a grand jury, this was "police work" for which there was no absolute immunity. *Buckley*, 113 S. Ct. at 2616-17. Neither, said the Court, were post-indictment press conferences a prosecutorial function. 113 S. Ct. at 2618.

Roughly stated, absolute immunity attaches to prosecuting but not to investigating or administering, neither of which relates to the advocate's preparation for the initiation of a judicial proceeding. Id. at 2615. This rough line is obviously hard to apply. The paradigm act of prosecution, calling and presenting a witness at trial will necessarily require investigation (interviewing the witness, showing the witness physical evidence, etc.) and administration (ordering the police to find the witness and give the witness a ride to court, etc.).

All of this the Supreme Court recognized in Buckley where it said that absolute immunity must include acts of "the

professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made . . . There is a difference between the advocates role in evaluating evidence and interviewing witnesses as he prepares for trial . . . and the detectives' role in searching for the clues and corroboration that might give him probable cause to [arrest]. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley,* 113 S. Ct. at 2615-16.

In *Evans v. County of Cook,* 1995 U.S. Dist. LEXIS 18231, 1995 WL 733451 (N.D. Ill. 1995), I found absolute immunity to protect a prosecutor who allegedly did a bad job by not carefully weighing the justice of a domestic battery charge, delaying investigation of the charge and persisting in the charge after the complaining witness wanted to drop it. There are other cases which hold prosecutors immune from suit for ignoring evidence and failing to investigate. See *Glick v. Koenig,* 766 F.2d 265, 269 (7th Cir. 1985); *Elder v. Athens,* 54 F.3d 694, 695 (11th Cir. 1995).

On this line of cases, defendant relies for dismissal. n4

n4 He also argues that the malicious prosecution alleged here is not a constitutional tort upon which § 1983 liability may be founded, particularly where there was no incarceration. Read broadly, the complaint says Marshall Spiegel was evicted form his apartment, his employment status was adversely affected, and he lost income. Malicious prosecution is a Fourth Amendment claim, plaintiff alleges his claim under the Fifth and Fourteenth, but this is a trivial objection easily overcome by an amendment which I would allow.

Albright v. Oliver, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) addressed the issue. Four members of the Court found that whatever remedy there was for malicious prosecution was to be found in the Fourth Amendment. Albright did not claim under the Fourth in the Supreme Court so his case was lost. Their opinion did not address the sufficiency of the claim. Albright does not teach anything about the nature of the allowable claim. The lower court it affirmed did teach something. In *Albright v. Oliver*, 975 F.2d 343 (7th Cir. 1992) the Court said malicious prosecution does not sail as a constitutional tort absent incarceration, loss of employment or other "palpable consequences." Albright said he suffered the restriction of pre-trial bond, the cost of defense, loss of reputation and consequent inability to do business, get a job in the community or secure credit and the necessity of relocating from *Macomb to St. Louis*. 114 S. Ct. at 821 (Souter, J. concurring). This was not enough for the Court of Appeals. I judge eviction from an apartment to be a palpable consequence. The vaguer allegations of "adverse effect" on employment and loss of revenue may not be palpable. They look much like Albright's allegations about employment. In any event, enough is alleged under prevailing law.

In response the plaintiff concedes all of this analysis. Rabinowitz is liable, says the plaintiff, because he was not really exercising a prosecutor's function because he was not acting to decide whether to proceed with the case or to prepare for prosecution. He was assigned to evaluate the case and report to a supervisor who would decide what to do and how to do it. And his true failing was maliciously to misrepresent his investigative results to his supervisor. So he was the functional equivalent of a police officer sent out by a prosecutor to investigate and report back. n5

n5 I attach no significance to the fact that Rabinowitz gave Miranda warnings. The warnings were probably unnecessary since no one appears to have been in custody or under arrest. In any event, the duties imposed by Miranda apply to prosecutors acting solely as prosecutors.

No case which addresses this issue is cited to me. Perhaps plaintiff argues that in a multi-prosecutor office, only one prosecutor has absolute immunity, the decision-making prosecutor. But, prosecution is often a joint enterprise and recommendations are exchanged and debated. Preparing part of a case, examining fact and law for another prosecutor's use is part of the prosecution function. Assume in the midst of trial, the chief prosecutor assigns an assistant to interview a witness and recommend whether or not to call the witness. The assistant reports on what occurred and recommends calling the witness who turns out to be good for the prosecution but, in fact, unreliable. I doubt that the assistant prosecutor is not absolutely immune. As noted by the Court in Imbler, prosecutors are often faced with conflicting evidence, "shady" witnesses, and tough decisions regarding whether a case should be brought against a particular defendant. *Imbler,* 424 U.S. at 426 n.24. These decisions (which evidence to present at trial, which witnesses to call, and whether a case should even be brought in the first place), although technically occurring before the actual trial, should be protected by absolute prosecutorial immunity. The Court even noted that absolute immunity protects a prosecutor who willfully uses perjured testimony and who willfully suppresses exculpatory information. *Id. at* 431 n.34.

Marshall Spiegel's counsel, perhaps tongue in cheek, characterizes absolute immunity as having "Narrow confines." For this he cites a line from Burns v. Reed which refused to extend immunity to any action related in any way to the ultimate

decision whether to prosecute. The Court said "we have never indicated that absolute immunity is that expansive." *Burns*, 500 U.S. at 495. How one bases a conclusion that a doctrine is narrowly confined from the statement that the doctrine is not so expansive as to cover any act by prosecutor is a little beyond me. It may be similar to what Rabinowitz is supposed to have done in reporting to his superiors.

Absolute immunity is not a narrow doctrine. Its ambit is quite broad and, when the doctrine is criticized, it is hard to find a commentator who says it is too narrow. There is very little law on this question. n6 We know that a police officer who gives false evidence to a prosecutor cannot escape liability by using the prosecutor's decision to proceed as shield. *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988). And both the Court of Appeals and another District Judge have opined that a prosecutor who concocts evidence and deceives superiors during the investigation of the case would not be absolutely immune. *Buckley v. Fitzsimmons*, 20 F.3d 789, 796-97 (7th Cir. 1994); *Buckley v. County of DuPage*, 1996 U.S. Dist. LEXIS 162, 88 C 1939 (N.D. Ill. 1996) (Coar, J.). None of these cases addresses the crucial question here. In Jones, the persons sued were police officers who do not possess absolute immunity. In the Buckley cases, both courts were dealing with actions by prosecutors who already had been found to be acting outside the prosecutorial function. Neither court was faced with a claim against a prosecutor who was pursuing a matter in which a charge had already been filed. There is a single passage in Judge Easterbrook's opinion in Buckley that is suggestive of an answer: "If the prosecutors themselves had concocted the evidence,...the immunized prosecutorial decisions would be the cause of the injury...They induced two experts to give testimony more damaging to Buckley than these experts' initial notes and reports suggested. These wrongs, if they are wrongs at all,

occurred at trial...and do not support an award of damages." *Buckley*, 20 F.3d at 797.

n6 We know that a United States Attorney General is not protected by absolute immunity when he authorizes a warrantless wiretap. *Mitchell v. Forsyth*, 472 U.S. 511, 520-21, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (reasoning that because the wiretap authorization was not done for anticipated prosecution or to further a criminal investigation, but only to gather evidence, the attorney general was performing an investigatory, not a prosecutorial, function). Whereas a judge is granted a broad absolute immunity while performing his judicial functions, see *Stump v. Sparkman*, 435 U.S. 349, 355-56, 364, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978) (granting absolute immunity to a judge for asserting jurisdiction over a particular case, and emphasizing that a judge should have the power to act on his own convictions, and be free of apprehension about any personal consequences that may arise from his decisions), a judge performing administrative duties, as is any other government official, is not protected by absolute immunity, see *Forrester v. White*, *484* U.S. 219, 229-30, 98 L. Ed. 2d 555, 108 S. Ct. 538 (1987) holding that a judge's personnel decision to fire a probation officer, was administrative, not judicial in nature, and thus did not provide the judge with absolute immunity). We also know that prosecutors are not protected by absolute immunity when they planned and helped execute a raid in order to gather evidence of suspected criminal behavior. *Hampton v. City of Chicago*, 484 F.2d 602, 608-9 (7th Cir. 1973) rejecting the prosecutors argument "that evidence gathering is so closely related to the presentation of evidence at trial that it should also be clothed with immunity").

This suggests the answer in this case that Rabinowitz is absolutely immune. What he did occurred after the charge had been filed and after prosecution had commenced. His sin, misrepresenting the evidence to his superior, is surely less grievous than concocting evidence. Whatever lies he told his superior do not prevent the truth from prevailing at trial, while concocting evidence, and presenting that evidence at trial may well have that effect.

The better reading of the Supreme Court jurisprudence is that the context is important. What a prosecutor does after a charge is filed (and after the charging process has begun) is covered by the cloak of absolute immunity. We know that there is a temporal limit to absolute immunity. It begins with the charging process, it also ends when the prosecution is over and the prosecutor moves on to other matters. Thus, a prosecutor who discovers exculpatory evidence after trial and after she has left the case, and then fails to disclose it, is not absolutely immune. See *Houston v. Partee*, 978 F.2d 362, 365-68 (7th Cir. 1992) (no historical warrant for extending absolute immunity to prosecutors who fail to disclose exculpatory evidence acquired when they are no longer personally prosecuting the criminal case).

In *Boyd v. Village of Wheeling*, No. 83 C 4768, 1985 WL 2564 (N.D. Ill. 1985), Assistant States Attorney Zehe was called to the police station immediately after Boyd had been questioned by the police. Boyd complained to Zehe of coercive and improper police action, then Zehe began to question the plaintiff himself. Boyd sued Zehe and argued that Zehe had acted as an investigator during the interrogation, and could not assert absolute immunity. Judge Grady dismissed the action, stating:

> In this case, Zehe was not called to the station until long after plaintiff was first detained and the questioning began. In fact, Zehe was not called until after plaintiff had confessed. It is reasonable, indeed desirable, that Zehe question plaintiff himself to verify the confession obtained by the police before making his own decision whether or not to file charges. Zehe did not participate in the decision to interrogate plaintiff for seven hours . . . We find, therefore, that Zehe's actions were part of his quasi-judicial function in gathering and evaluating evidence in order to make a prosecutorial decision whether or not to file charges. Zehe is absolutely immune from civil liability for his actions in connection with this case.

Boyd, at 11.

In *Hunt v. Jaglowski*, 926 F.2d 689 (7th Cir. 1991), the police had already questioned Hunt. Assistant States Attorney Petrocelli then visited the station and Hunt complained that the police had used coercive tactics to get a confession. Petrocelli allowed the officers to continue interrogation, and the plaintiff eventually confessed. In affirming the district court's directed verdict in favor of Petrocelli, the Seventh Circuit noted that a states attorney "is vested with exclusive discretion in the initiation and management of a criminal prosecution." *Hunt*, 926 F.2d at 692. This discretion includes the determination of which charges will be brought by the Assistant States Attorney. Id. The court referred to the Boyd case, and emphasized:

> Petrocelli's function in being present was merely to review, approve or disapprove, and issue the charges the police were seeking. The police had conducted the investigation of this case, as was their function, before

> Petrocelli was called. Petrocelli was not present during the polygraph test nor the lineup; Petrocelli was not present when Hunt claims he was beaten; and Petrocelli was not present at the particular time Hunt alleges he gave his coerced confession. Like the plaintiff in Boyd, Hunt's initial contact with Petrocelli came when Petrocelli was called after Hunt had confessed and the police were seeking review of and approval or disapproval of the charges they were detaining him on. Because this is an act toward "initiating a prosecution and in presenting the State's case," Petrocelli enjoyed absolute immunity.

Id. at 693.

There is a clear analogy between *Boyd, Hunt*, and this case which involves initial questioning of the plaintiff and the filing of reports by the police, followed by subsequent review by a state's attorney. Rabinowitz, in reviewing the police reports and interviewing the four witnesses, was doing prosecutorial duty in anticipation of trial. Two complaints had already been filed. The police had conducted an investigation into exactly what happened on the night of May 29, 1993. Police reports had been prepared. Rabinowitz was reviewing these documents and interviewing these witnesses in order to assess the prosecutorial value of the case. Rabinowitz knew that someone could lawfully be charged as a result of these complaints. Under *Buckley*, a prosecutor assumes the role of advocate, once there is a probable cause for arrest. In this case, the police reports and the two complaints clearly demonstrated a probable cause for Rabinowitz to file a charge against some individual.

What is outside the existing jurisprudence is the question of which prosecutors possess immunity. Obviously, the decision

maker is immune. I doubt that one can refuse to extend it to all prosecutors who are jointly presenting the case. But here, it is alleged, there was no joint action. Rabinowitz was there to investigate, assess and report to his superior who alone would decide what to do.

It could be argued that the Supreme Court in *Buckley v. Fitzsimmons* adopted the model of an absolutely protected prosecutors who make decisions and less protected prosecutors who investigate and recommend. I think this is not so. At the heart of *Buckley* is the idea that the prosecutors there were doing precharge process police work. They were liable not because as assistant prosecutors they had an independent duty to speak truthfully and without malice which exempted their absolute immunity; rather they were liable because police officers doing the same thing are protected only by qualified immunity.

It is my view that a prosecutor who is told by his superiors to investigate a pending charge and to report back is performing a prosecutorial, not a police, function. I think this is the policy of the Supreme Court.

I would be reluctant to approve a rule which would make the outcome of immunity questions depend upon the precise nature of the chain of command in a prosecutors' office. We are, after all, construing a rule which affords not only exemption from liability but exemption from suit. Its value would be diminished if every time a prosecutor were sued, discovery would be had into the precise relationship of prosecutor to prosecution decision. Does the assistant prosecutor simply report facts, or recommend or decide. If the suit is defended on the grounds that the assistant prosecutor has the power effectively to recommend (and, having such power, is a decision maker), then there ought

to be discovery of all the files on which the assistant prosecutor worked in order to test the truth of the defense. Indeed, the claim that an assistant prosecutor is a decider or not a decider will justify discovery ranging over the entire workload of the prosecutor. Detailed inquiry into the thought processes and the respective (and sometimes shifting) roles of prosecutors in a single case may be had. This consequence seems profoundly at odds with the purpose of prosecutorial immunity.

The complaint is dismissed.

Enter:

James B. Zagel

United States District Judge

Date: 8 April 1996